

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1324

To be argued by
IVAN S. FISHER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

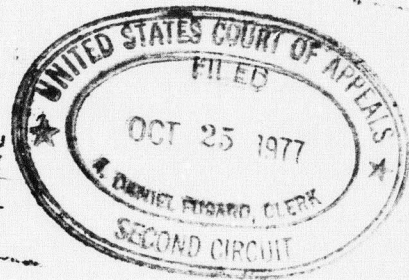
Appellee, :

-against- :

FRANK MOTEN, :

Appellant.:
-----X

APPELLANT'S APPENDIX



VOLUME II

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
Appellee, :
-against- :
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
UNITED STATES OF AMERICA, :
v. : 76 Cr. 224
JUAN ANTONIO ALVAREZ, et al., :
(SEBASTIAN INTERSIMONE), :
Defendants. :
----- -x

B e f o r e :

HON. RICHARD OWEN,
District Judge
New York, New York
January 31, 1977
2:00 p.m.

APPEARANCES:

ROBERT B. FISKE, JR.,
United States Attorney
Southern District of New York
DANIEL J. BELLER,
JOHN FLANNERY,
Assistant United States Attorneys
DAVID KEEGAN, Esq.,
PAUL B. BERGMAN, Esq.,
Attorneys for Defendant

(In the robing room)

THE COURT: Good afternoon, gentlemen.

Mr. Keegan, how are you?

MR. KEEGAN: I am fine, your Honor.

MR. BELLER: This has nothing to do with
the Intersimone sentence?

THE COURT: It does not, but you can partici-
pate.

Do you know any reason, Mr. Beller, why you
can't participate?

MR. BELLER: No, your Honor.

THE COURT: We have certain motions which
I presume you want to hear in chambers or the government
would want heard in chambers because their affidavit
is submitted in camera.

MR. BERGMAN: Certainly the order to show
cause.

MR. FLANNERY: I may indicate, so the record
is clear, that with respect to the indicated in camera
matter, Mr. Keegan was served with papers that were
labeled "In Camera." The subpoena was served on him on
the 19th of January.

THE COURT: I see.

Now, what goes first?

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MR. BERGMAN: I suppose the order to show cause which seeks disclosure to me as Intersimone's attorney -- the papers which the government is now relying upon to seek further disclosure from Mr. Keegan in the grand jury --

THE COURT: It had been my intention, and I may not include everything you are talking about here, that anything as to which Mr. Intersimone had an arguable privilege here, and that has to do with anything he said to Mr. Keegan, I had intended that you should see it in order that you might obviously confer with your client as to what position you wanted to take with regard to it.

To the extent that that is what the order to show cause deals with, it was my intention that anything Mr. Keegan reported to me that is in the transcript of the Alvarez trial that speaks to a communication of his client, confidential or not, it was my intention that Mr. Intersimone and any counsel he designated should be privileged to see it.

Does that deal with the order to show cause?

MR. BERGMAN: I suppose it does, your Honor. But I understand as well that Mr. Keegan was present in your Honor's chambers on September 20th not only for purposes of speaking to you about such information that

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2 he had, but also I gather from Mr. Keegan's affidavit
3 submitted in opposition to the motion to quash, that he
4 was also present during the time that the juror spoke
5 to your Honor as well as Intersimone.

6 If that is the full matter which is covered
7 by those pages which were sealed by your Honor, I would
8 request that disclosure also include those materials
9 to the extent that the government has them.

10 THE COURT: What is the government's position
11 on that?

12 MR. FLANNERY: The government opposes that,
13 your Honor. It is irrelevant to the question of the at-
14 torney-client privilege, however framed. So while I
15 do not oppose presently, just for the purposes of effi-
16 ciency, although I do think there are problems even dis-
17 covering what Mr. Keegan said to the Court, I certainly
18 think that the argument is stronger that there is nothing
19 discoverable about the statements by Keno or by Intersimone
20 before your Honor.

21 I think that the cure for that would be for
22 Judge Pierce, who is considering the entire matter, to see
23 the entire transcript of that.

24 I think that the question to which Mr. Bergman
25 is addressing himself, that is, what Keegan said to the

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2 Court and whether or not he violated some attorney-client
3 privilege, would be cured by seeing Mr. Keegan's state-
4 ment.

5 It is my understanding that Mr. Keegan has
6 on a number of occasions received a copy of the tran-
7 script. He has conferred with Mr. Bergman and told him
8 in some detail what his conversation was with both
9 Mr. Intersimone and the Court.

10 There is an affidavit filed by Mr. Keegan
11 and which I am sure Mr. Bergman, as he said, has had an
12 opportunity to review. That is filed in Part I, your
13 Honor.

14 MR. BERGMAN: That is attached to my papers
15 as Exhibit B. It seems to me that the necessity of
16 having filed the transcript of those entire proceedings
17 at the time of the trial while it was going on is one
18 matter. But now through the actions of the U. S. Attorney
19 Office the case is in an entirely different posture.

20 Granted they are conducting a grand jury
21 investigation and granted also the grand jury investiga-
22 tions are supposedly usually conducted in secret, I think
23 the problem here is somewhat subject to the extent that
24 the government is seeking to rely on any in camera
25 material before your Honor at which Mr. Keegan was present.

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2 I can't understand how they are now asking
3 that Mr. Intersimone's current attorney be placed in the
4 position of relying secondhand on what Mr. Keegan's
5 recollection is, particularly since the government itself
6 is now using those materials that I have not seen to argue
7 before Judge Pierce on the current question of whether
8 Mr. Keegan should be put into the grand jury.

9 There is an allusion in Mr. Keegan's papers
10 to what he recalls to have been MR. Keno's statements to
11 your Honor. He puts that recollection in opposition to
12 what Mr. Flannery has said apparently in his affidavit.

13 Now, if Mr. Flannery wants to rely on limited
14 portions of the matters before your Honor and only those
15 limited portions disclosed to me, that is one thing.
16 As long as the government is relying on material-- again
17 I emphasize-- this is material which was developed at
18 the time when Mr. Keegan was present and he was Mr.
19 Intersimone's attorney. I don't see why now a new attorney
20 for Mr. Intersimone should be put at a disadvantage.

21 MR. FLANNERY: I think that a concession that
22 this is a grand jury investigation does to a large extent
23 end the discussion right there. We were talking about what
24 Keegan said in relation to a conversation he had with his
25 then client, Mr. Intersimone. That was the application, and

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that's what is being provided.

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However, I don't understand the standing to find what might be the subject of further investigation. One of the reasons it was filed is to preserve not only the integrity of the trial at that time but to preserve the possibility of investigating this matter further without others having the information available to them.

It seems to me to disclose the matter to a person who is the target of the investigation is a slightly absurd result. And the subject matter of whose recollection is accurate, whether it be the government's or Mr. Keegan's as to what was said by Mr. Keno in the conversations was cured by Judge Pierce having a copy of the transcript before him.

Judge Pierce, I am certain, can make a determination as to whether or not based on that transcript there was evidence of an ongoing crime and that the attorney-client privilege is therefore not applicable.

It is a matter, of course -- as my meager understanding of the law of attorney-client privilege goes -- to have available when an investigation is going on to have material submitted that is in camera, it seems to me in this situation that the rights of an individual, Mr. Intersimone, as suggested by Mr. Bergman, are preserved

by preserving those portions which are submitted in camera for any further, if necessary, review after, say, an indictment comes down.

Right now Mr. Intersimone's rights are not compromised in any way.

MR. KEEGAN: Your Honor, I fail to understand on what authority the Court would continue to have a record sealed. I think Mr. Flannery is confusing the fact that there is a grand jury involved to say that these things should remain concealed. I don't think that is so.

MR. FLANNERY: I am addressing myself to a grand jury investigation. I am addressing myself merely to the grand jury investigation and not to the Alvarez trial.

MR. KEEGAN: What is involved here is portions of a record of a trial which will be the basis of an appeal. Whether this will be one of the issues on the appeal I don't know, but I don't think the Court has the authority to keep those minutes sealed.

MR. FLANNERY: The subpoena of David Keno of the grand jury is going to be--

MR. KEEGAN: We should unseal the trial minutes so that the man can frame the issues on appeal.

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MR. FLANNERY: We are not talking about an appeal.

THE COURT: Nobody has asked me to unseal those minutes for appellate purposes in any way, shape, or form until you spoke a minute ago.

MR. KEEGAN: I think it would cut through this.

THE COURT: Let's stick with one issue at a time. If there is some basis for this being an appellate issue, then obviously we can view it in that light at that time, but we are not being asked to do that at this moment. Maybe at that time we will have a different picture.

Let's get out of the way first the fact that the minutes to the extent that they reflect what you said, those Mr. Bergman gets.

All right. I don't see any basis given me at this point to turn over what Mr. Keno or Mr. Intersimone sister said.

MR. KEEGAN: The government makes use of portions of those statement.

THE COURT: I understand, but they are making use of the portions of those statements in connection with an investigation. I don't see where the target of the

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2 investigation should be given such statements at this
3 point. Nothing is shown me as to what right the target
4 has to those statements or what legitimate use could be
5 made of them.

6 I can see only frankly illegitimate use being
7 made of them at this point. I don't see the government
8 has any duty to turn over.

9 At the time you were legitimately there be-
10 cause at that point you had a client's interest to repre-
11 sent, but that whole thing is behind us now. There is no
12 longer, it seems to me, a legitimate interest of Mr.
13 Intersimone or you in these. At that point you had an
14 interest and you were there to protect that but just be-
15 cause you were there does not mean that Mr. Bergman is
16 entitled to a copy.

17 MR. BERGMAN: To the extent that in making
18 the argument that Mr. Keegan should now testify in the
19 grand jury, the government relies on those statements, and
20 I think we are entitled to see them.

21 THE COURT: I don't think so. This is a
22 communication from Mr. Intersimone to Mr. Keegan. Either
23 it is protected by the privilege or it is not protected
24 by the privilege.

25 MR. KEEGAN: In developing that, your Honor,

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2 this is an argument to protect the conversation involved
3 seeking advice in an ongoing criminal matter, but the
4 rest is that argument about what Mr. Intersimone said and
5 Mr. Keno said in your presence.

6 He was not seeking an advice in an ongoing
7 criminal matter --

8 THE COURT: You made that communication be-
9 fore either Mr. Keno or Mr. Intersimone gave testimony.
10 So either it was revealable on its own legs or it was not
11 revealable at all.

12 MR. KEEGAN: In order to know if it was re-
13 vealable one branch of the argument is that it was a
14 furtherance of the investigation of a criminal act.

15 MR. FLANNERY: Your Honor, my answer to that
16 is what I have already stated. I will make application
17 now to have that portion of the sealed transcript avail-
18 able to Judge Pierce for the purposes of his consideration
19 of this issue so that he can see not what my affidavit
20 said, but what Mr. Keno said to the Court and what Mr.
21 Intersimone said.

22 THE COURT: Since he has got the overall con-
23 trol of this grand jury investigation obviously he would
24 have that right in any event.

25 On this record before me I do not see a basis

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2 for unsealing and turning over to you, Mr. Bergman, the
3 Keno and Yolanda-Intersimone testimony which was taken
4 before me.

5 MR. FLANNERY: The record that I am now hand-
6 ing to counsel is a copy of that sealed portion of the
7 transcript that involves Mr. Keegan's statement to the
8 Court.

9 Just so that the record is clear, Judge
10 Pierce has set this matter for argument tomorrow morning
11 10:30 in Part I so the grand jury investigation can
12 continue.

13 Thank you, your Honor.

14 I am sorry to interrupt your schedule.

15 THE COURT: That is the order to show cause,
16 right? That takes care of the order to show cause, I
17 gather?

18 MR. BERGMAN: Not entirely to my satisfac-
19 tion.

20 THE COURT: The order to show cause is ruled
21 on in accordance with the minutes.

22 MR. BERGMAN: I take it Mr. Flannery will have
23 no objection to providing me a copy of his affidavit?

24 MR. FLANNERY: That is the sealed portion of
25 the transcript. However, I suppose I could excerpt the

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23 no objection to providing me a copy of his affidavit?

24 MR. FLANNERY: That is the sealed portion of
25 the transcript. However, I suppose I could excerpt the

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page which discusses that portion of the testimony and provide Mr. Bergman with a copy of my affidavit.

MR. BERGMAN: That is more properly a matter for Judge Pierce.

THE COURT: I am going to seal Mr. Flannery's affidavit of January 25, 1977, and with the observation that in reaching the conclusion I reached, I reached it solely on Mr. Keegan's minutes before me during the trial.

All that Mr. Flannery did by giving me this affidavit was to refresh my recollection of the trial. It did not figure in the conclusion that I reached here.

MR. BERGMAN: Do I understand that Mr. Flannery is going to expurgate his affidavit and then provide me with --

MR. FLANNERY: I was not going to do that but if your Honor was considering that, I would do it.

THE COURT: Let's go to your notice of motion dated January 27th or should we do this in open court?

MR. BERGMAN: Yes, in open court.

THE COURT: All right.

(In open court)

MR. BELLER: Government ready, your Honor.

THE COURT: I assume we must deal with this notice of motion before sentencing.

MR. BERGMAN: Yes, your Honor.

I have nothing more to add to it by way of oral argument, your Honor, aside from those arguments advanced in the affidavit.

THE COURT: Let's not be so quick. There are basically three grounds for relief.

The fourth ground is the lawyer's insurance policy of asking for such other and further relief the Court may deem proper.

I take it under that you really have nothing to ask me for.

MR. BERGMAN: Except in the affidavit we have asked the Court to examine in camera by the Court alone such minutes as have been developed in the grand jury respecting this issue. That is all.

THE COURT: That request I deny.

Now, Request No. 1 is a judgment of acquittal on the ground the evidence was insufficient.

I deny that motion.

The second is in two branches--no, three branches.

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2 Let's take that first branch. What is the
3 variance that you are urging upon me?

4 MR. BERMAN: Your Honor, I must preface my
5 remarks. This case has come to me all within the last
6 couple of weeks. I have not had a chance to review the
7 trial transcript, but from discussions with co-counsel in
8 the matter and other attorneys in the case, it is my
9 understanding that there is for possible preservation on
10 appeal the question of whether or not the proof at trial
11 varied with the charge in the indictment with respect to
12 the conspiracy.

13 By this motion I simply wish to preserve, if
14 it hasn't already been preserved, that issue for appeal.

15 THE COURT: All right. I deny the variance is
16 sue, and (2), the improper joinder I take it is the
17 multiple conspiracy which I ruled upon before a number of
18 times and that is denied.

19 The third one, the defendant was not tried
20 before an impartial jury? What is the support for that?

21 MR. BERGMAN: Your Honor, at this point the
22 only support we have are portions of the minutes which
23 have been sealed by the Court and which remains sealed,
24 and in addition, those matters which developed in court
25 at the trial with respect to the jury in this case.

Our main request in this motion is simply to be put in a position similar to the government, to be able to interview these jurors so as to determine whether or not there is a taint to the jury.

At this point, without that information, we are bereft of any opportunity to conduct such an investigation, and we believe that we are entitled to conduct that investigation in order to establish if in fact there was a taint in the jury.

THE COURT: All right.

As to that statement that the defendant was not tried by an impartial jury, I deny that aspect of the motion.

Let's go to Item 12 which seeks the names and addresses of the jurors and alternate jurors.

MR. BERGMAN: Your Honor, an event occurred in this trial which I have no doubt was upsetting to just about all the parties in the case save perhaps one or two individuals. I suppose it is an event that the Court and the United States Attorney's Office is very wary of in these kinds of cases.

There is an investigation, to my knowledge, currently going on with respect to the jury that sat in on this case. Part of our proceedings in camera were

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devoted towards a brief discussion, and I think the United States Attorney acknowledge that there is such an investigation going on in this case.

We believe --

MR. BELLER: Your Honor, I think at this point I ought to just jump in and say that I don't believe that anybody has ever acknowledged that there is an investigation with respect to the jury.

THE COURT: I was going to say that this is a lot broader than you have any basis for. There is an inquiry with respect to one juror?

MR. BELLER: Yes, your Honor, who was already previously arrested on a complaint, and I understand that is the nature of the inquiry.

THE COURT: One juror, and whatever ripples flow from that stone in the lake, that's the investigation as I understand it.

MR. BERGMAN: I will accept Mr. Beller's representation, but I don't think that goes to the question of whether or not, if we assume that one juror was implicated in this case, that we can say with any degree of certainty, that some of the jurors who did remain on the case were not so tainted.

THE COURT: I interrogated each one individual

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2 as you may be aware. I interrogated those remaining
3 jurors with questions that had met with the approval of
4 all 22 counsel in the courtroom, and after that interro-
5 gation, I read to the assembled counsel the answers of
6 each of the remaining 11 jurors and 5 alternates.

7 Again, this is going on memory alone, I asked
8 if anybody wanted further questions put.

9 MR. Beller, have you reviewed those minutes
10 lately?

11 MR. BELLER: I may have asked that some addi-
12 tional questions be put.

13 THE COURT: I don't remember any defense
14 counsel asking me to put any further questions than I
15 had already put, and defense counsel were satisfied with
16 the extent of the inquiry at the conclusion of that mat-
17 ter.

18 MR. BERGMAN: Your Honor, the trial is over
19 and we are asking for a very limited form of relief. We
20 are not asking in the third branch of our motion that
21 there be a mistrial or a new trial declared.

22 We just want the names and the addresses of
23 the jurors so we could interview them.

24 A denial of that request could go on a premise
25 that by allowing the defense to interview these jurors,

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that there will be some sullyng of their testimony or the information that they gave.

It seems to me that that could be the only possible reason why such a request could be denied by the Court.

THE COURT: Say that again to me.

MR. BERGMAN: We are talking about people now who sat in the jury of this case who are witnesses to an event just as any other individual would be a witness to a crime. There is no rule of law that I know that restricts access to these witnesses only to the government or to the Court. I think that where a defendant wishes -- and I don't believe that a specific ground has to be asserted-- but simply wishes to interview the jurors who sat in on the case that adequate provision could be made by the Court so that those jurors could perhaps be brought into the courthouse and an Assistant United States Attorney could, if those jurors wished, be present during the interview, or other safeguards could be taken to protect what I suppose to be the worst beliefs that would be held by the United States Attorney.

All we are asking for is the opportunity to speak with these people, ask them the questions that we want to ask them, and if your Honor wishes to put some kind

of check on it, we will be amenable to that.

But we simply would like the opportunity to speak with them, to see whether in fact there is an issue of taint in this case.

I don't think that is an unreasonable request provided that restrictions your Honor may deem appropriate were put on.

THE COURT: Mr. Beller, do you want to make a statement?

MR. BELLER: Yes. I think it should be clear that the requests, just so it is all on the record, that a request for an order disclosing the names and addresses of the jurors is in fact a request for the defense to interview the jurors. Otherwise, it wouldn't make any sense; although Mr. Bergman can't cite any rule of law that limits that possibility, it is in fact established law in this Circuit.

I am thinking of United States v. Igarry and United States v. Brasco, 516 F. 2d, 816, and United States v. Miller.

It is established law in this Circuit that such posttrial interviews and full scale investigations of jurors is frowned on, and to the extent in extraordinary circumstances it is permitted, Judge Friendly announced a

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ruling, and it has been followed in other cases that the interviewing should be conducted with the supervision of the Court and in fact by the Court.

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Now, in the event that if we were starting over and this was a blank slate and the Court believed it was important to conduct such an interview, it would be done by the Court and I think in camera.

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But in this case that has already been done. At the time the issue came to the Court's attention, the Court advised counsel the Court intended to interview all of the jurors and all of the alternates, and the Court conducted the inquiry that would be conducted now had it not been done then.

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All of the jurors responded that they had not been spoken to. I reviewed the minutes and I noticed some things. They were asked:

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"Q Did you talk about the merits of the case?"

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And some jurors asked the Court what did he mean by "merits" -- but whatever inquiries should be conducted, had it not been done, has already been conducted.

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While Mr. Bergman has not pointed to any reasons why this kind of posttrial inquiry, even were the charges there is an allegation or a hypothetical possibility of outside influence, he has not pointed to any

reason why it should not be conducted, there are many reasons.

Jury service is difficult enough as it is. This kind of posttrial interviewing of jurors is a kind of harassment. It is a tremendous inconvenience. The Mattox case points out it does produce an increased possibility of jury tampering and so on.

So here where clearly the request is in the nature of a fishing expedition, to go out and find out whether there is a possibility that one of the jurors may have heard about something that the Court took particular care and attention to keep secret from all of the participants, all of the jury, it seems to me, that the request does not meet the hurdle raised by the cases which strongly suggest that posttrial interviews of jurors is strongly frowned on.

The Court took every precaution it could possibly have taken when such an incident occurs with the advice and consent of defense counsel.

The mere fact that Mr. Intersimone has a new attorney at this time should not in any way undercut the fact that at that time all of the participants, and I mean the defendants, and their counsel, believed that the Court's inquiry had gone far enough, if not too far.

Counsel should not be in the position now of saying: Now that we have been convicted, we would like your Honor to go even further.

THE COURT: Do you happen to have the minutes in the courtroom?

MR. BELLER: I don't.

MR. BERGMAN: I do.

May I just reply briefly, your Honor?

THE COURT: Sure.

MR. BERGMAN: The problem confronting the Court during the trial was an entirely different problem that confronts the Court now, I think.

At the trial the question of --

THE COURT: I am curious that you say that because it seems to me it is the same problem. My problem was to preserve the integrity and the impartiality of the jury both then and now. If there had been any concern as to the integrity of the jury at the time, I certainly did not want to let it go to the end of the trial and have somebody say: You should have done something more or something different.

MR. BERGMAN: I think there were conflicting pressures at the time that this incident first arose. The first pressure was operating on the assumption that

Juror No. 10 was the only juror, was the only one who had been so approached by an outside party.

Under that assumption one would have asked very limited questions of the kind that your Honor asked for fear that if the questioning got any deeper than by the very questioning, the jury would sense that something was wrong, that something untoward was occurring with respect to them, and with respect to the defendants.

We are not operating under any such constraint now. In a sense the kind of inquiry which was conducted during the trial was based upon a gamble, if you wish, that No. 10 was in fact the only juror.

Along with that assumption I think what the Court did was proper at that time by conducting a very limited three-or-four-question inquiry of each of the jurors. But I think if we step back, we have got to realize that that kind of an inquiry is not guaranteed, at least it puts a juror in the position of answering the questions the way they expect them to be answered or the way the Court would want them answered.

Now, it may be frankly that this would mean nothing, that these interviews that we would conduct of these jurors would show nothing at all with respect to the issue of jury taint.

But this is not the ordinary case I believe Judge Friendly was speaking to when he said the Court should frown on possible jury interviews.

I think that if we step back from a case -- I am sure it taxes the Court's resources and taxes everybody's resources -- we would have to say to ourselves that in a way we cannot just sweep this question of the jury under the rug.

I am not asking the Court, I don't think, for any drastic kind of relief. I am simply requesting the Court to give Mr. Intersimone, myself, and in fact I suppose in a way since we are down to the benefit of the other defendants, the opportunity to speak with these jurors.

If the question of whether or not they are to feel importuned by this request of defense counsel, if that is to arise, we will let them raise it if they don't want to come in and speak with us. But I don't think the United States Attorney should be heard to speak for them on that issue.

THE COURT: Forget the United States Attorney. I think the Court is entitled to face up to a problem such as we had, and if the problem is serious enough and it is developed to be serious enough, then a mistrial is

mandated and you start all over again.

I don't think defense counsel can say: You did fine, Judge, but now the trial is over, I want to try to blow it out of the water because you did not ask enough questions. So I have a standing in this as well.

MR. BELLER: Your Honor, I just want to say in response--

THE COURT: Do you have those minutes that I could look at?

MR. BERGMAN: Yes. They may have some of my markings on them.

MR. BELLER: In response to some of the remarks Mr. Bergman made, I think it is at the very least absurd to suggest that neither the government, nor the Court, nor defense counsel were acting in what he calls a fashion of candor or an objective fashion at the time.

I object myself personally to any suggestion that it was in the interest of the government to try and proceed with a trial where there was a suggestion or even a remote possibility that other jurors might have been in one way or another familiar with the problem and not to take steps to try and root that out or to find anything out about that.

1
2 I know that was the Court's view as well.
3 As a participant in those proceedings, the concern of
4 everyone involved was to hopefully proceed with the trial
5 but in the main to discover whether there was any issue
6 of involving the jury that could be discovered and rooted
7 out at the time so that it would be, and that would be the
8 best fashion to proceed with the trial.

9 The Court took the steps that are designed
10 and directed by the Court of Appeals to deal with that
11 problem, namely, to interview each juror and to determine
12 whether they or he had heard of the problem or been
13 spoken to or approached by anybody.

14 MR. BERGMAN: Your Honor, just to clarify,
15 I am not here arguing that what the Court did at the time
16 that it was confronted with this problem was wrong. I
17 believe the Court did the proper thing under the circum-
18 stances.

19 We are in a different point right now. The
20 trial has been concluded. The jurors are scattered.
21 The verdict has been returned.

22 What we are seeking now again is a very limited
23 form of relief in this matter. It seems to me that to
24 deny us this relief in effect says that this jury can
25 never be questioned on these matters, and we are going to

1 assume for the purposes of the law that this jury was not
2 tainted any further than Juror No. 10 and that it was a
3 completely impartial jury.
4

5 THE COURT: These minutes that you give me un-
6 fortunately do not have the interrogation of the jury.

7 MR. BERGMAN: I apologize.

8 MR. BELLER: I have it and I have it marked
9 off; if you want me to run back to my office, I would be
10 happy to get it.

11 THE COURT: I think it would be helpful.
12 Why don't I take a recess?

13 (Recess)

14 MR. BERGMAN: I would just like to note for
15 the record, during the recess I had stepped outside, I
16 came back in, and Mr. Flannery was speaking with my
17 client, Mr. Intersimone.

18 I am not going to make any statements as to
19 what I think might or might not have been said, but I
20 think it was perhaps incumbent that any conversations
21 between the United States Attorney's Office and my client
22 would be held exclusively within my presence.

23 THE COURT: It may well have been that your
24 client was speaking to Mr. Flannery.

25 MR. BERGMAN: I make no judgment.

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MR. FLANNERY: I am Mr. Flannery.

During the recess Mr. Intersimone did approach me. I told him not to say anything to me and he did ask for my phone number and I gave it to him in the presence of Mitchell Kaufman. I told him that if I did speak to him, I would like to speak to him in the presence of the attorney.

MR. BERGMAN: The record is clear.

Thank you.

THE COURT: All right.

On this Item No. 3 I notice here that just for the record that, for example, on 4223 and the succeeding pages, I asked rather specific questions -- whether the jury had been discussing the case among each other, any jurors talking to each other about the merits.

The answer was no.

This is Juror, Miss Hicks:

"Has anybody else been talking to you about this case or tried to talk to you about this case?"

The answer was "No."

To another juror, "Anybody talk to you about it."

The answer was "My family asked me about it."

I asked: "Other than that, anything at all?"

The answer was "No."

These questions were broad but specific as to discussions with anybody.

"Did anybody attempt to talk to you about the case?"

The answer was "No."

In any event, it seems to me that the inquiry made with the counsel's concurrence at that time was sufficiently broad and while I appreciate your point at this point, you could theoretically have a no-holds barred inquiry of the jurors, it does seem to me in the midst of the trial and relatively early, either you have to pursue it to a mistrial or be satisfied.

It does not seem to me that you can say you like the inquiry to that point but now you want to find out really what happened and thereby jeopardize six weeks of trial with 22 defendants and 22 lawyers. It does not seem to me that one can in good conscience go forward from that and say, "I want to go further."

In any event, the question for the names and addresses of the jurors is denied. In denying it, I am relying on such cases as Miller v. United States, which is 403 F.2d 77 and U.S. v. Brasco which is 516 F.2d, 816, footnote 4 at page 819.

I do want to make a couple of observations.

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If a showing were made to me, which it is not at this point, that any other juror or jurors had been affected, I would then be in a different position.

Further, it would seem to me that if the government develops anything in the grand jury tending to show that other jurors were in fact affected, there is an obligation upon them, and I place an obligation upon them to bring that certainly to my attention in the first instance.

We will go from there, but absent that, I do not feel it is appropriate to permit what could be a harassing inquiry of jurors.

The Miller case indicates that it is within the trial judge's province and power to bring postverdict interrogations of jurors under the trial judge's control. I am herewith placing it under my control. Therefore, no interrogation of jurors is to be done without application to me on a reasonable basis.

The footnote 4 of Brasco that I mentioned is to similar effect.

MR. BERGMAN: Your Honor, I don't suppose that that is being granted as part of such other and further relief clauses of the motion, but I would like to state for the record our objection to what I take is now an affirmative restriction by the Court on

1 interviewing these jurors. You are placing us in a
2 quite untenable position. At the one point you are say-
3 ing to us that if the issue of jury taint is a real is-
4 sue and before you would disclose the names and addresses
5 of these jurors, we would have to make a showing.
6

7 I think it is evident from the only source
8 that we could make a showing of this matter are the jurors
9 themselves.

10 What would we do if a juror came up to us
11 and wished to tell us about some matter that had gone on
12 with the jury with respect to a matter of taint?

13 I think that the order that you have just
14 imposed is, I suppose, bad enough as far as we are con-
15 cerned because it prevents us on our own seeking to speak
16 with these jurors.

17 This places an additional burden upon us
18 which is, in effect, to clamp any possible information that
19 we could derive, clamp it down.

20 THE COURT: Well, just let me read to you from
21 Miller. Have you read Miller?

22 The Miller case, page 82, "Appellant's as-
23 sertion that a defendant must be as free to interrogate
24 jurors after conviction as he is to interrogate prospec-
25 tive witnesses before a trial does not require extended

1 answer. Inquiry of jurors after a verdict seems to im-
2 pugn the validity of judicial action on the ground of
3 misconduct of a member of the tribunal. The Court has
4 a vital interest in seeing that jurors are not harassed
5 or placed in doubt as to what their duties are and that
6 false issues are not created. The argument that inter-
7 views by a private investigator involves less harassment
8 than such methods as we have outlined are unconvincing.
9 At least one state known for the quality of its judicial
10 administration has adopted a rule that 'no attorney shall
11 himself or through any investigator or other person act-
12 ing for him interview, examine or question any juror
13 with respect to the verdict or deliberations of the jury
14 in any action except upon leave of Court granted upon
15 good cause shown.' N. J. Revised Rules 1:25 A."

17 Now, that case did not even involve, as I
18 understand it, an interrogation that was conducted during
19 the course of the trial on this very issue, and the Court
20 of Appeals concludes, "Being thus convinced that a trial
21 judge has power to bring postverdict interrogation of
22 jurors under his control, we find it difficult to conceive
23 a clearer exercise for this case than this one."

24 Frankly, I think this is a clearer case for
25 exercise because the interrogation was done during the

1 course of the trial with all defense counsel participating
2 in the formulation of questions at the time. So the
3 problem that faces you, I appreciate. The rule, however,
4 seems to me rather clear.
5

6 MR. BELLER: I would like to state -- I gather
7 from what your Honor said that if you were presented with
8 different facts, you might rule differently, and I gather
9 that relates to the state of the record as it is, your
10 Honor already having interviewed jurors.

11 THE COURT: Correct.

12 MR. BELLER: Even without a directive of the
13 Court we would have made known any information that might
14 have come to the government's attention.

15 THE COURT: I am sure that you would.

16 MR. BELLER: I want to state that there is
17 no information that the government, at least that I have,
18 from a juror relating to this issue at all. In fact,
19 I asked Mr. Flannery whether he had spoken to the jurors
20 and he told me he had not.

21 We should also place on the record, in connec-
22 tion with this matter, that the defense counsel have
23 already had a chance to interview rather extensively one
24 of the jurors, particularly the forelady, and that is an
25 additional matter, to be sure.

2 Since all counsel had information about this
3 jury problem, nothing has been forthcoming, though we have
4 had a lot of things forthcoming from the forelady, nothing
5 has been forthcoming with respect to this additional issue;
6 that is, a matter showing that the record as it stands
7 reflects accurately the situation that there was one par-
8 ticular juror with whom there was a problem, and that is
9 all.

10 MR. BERGMAN: I would like to make my position
11 clear for the record.

12 I believe that the situation which arose
13 with Juror No. 10 is itself a situation which takes this
14 case out of the ordinary cases, which the Miller case
15 speaks of. The very fact that this Court had to con-
16 duct some kind of inquiry along the line that it did con-
17 duct takes this case out of the ordinary cases.

18 I think Mr. Beller's remarks at the time this
19 issue first arose in the court when in response to Mrs.
20 Rosner's statements that she thought the charges were
21 99 to 1 against any juror on the case having had contact
22 with outside persons, his remarks were that he doubted
23 that or something to that effect.

24 I think that takes it out of the ordinary
25 cases. I believe that the fact that the government,

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2 even though these events occurred in September of 1976
3 is still seeking testimony before the grand jury regarding
4 this incident, I think that takes it out of the ordinary
5 cases.

6 Finally, I think that the limited form of
7 relief that we have requested in this case, and it is a
8 very limited form of relief, takes it out of the ordinary
9 cases.

10 And, your Honor, by preventing us from speak-
11 ing with these jurors, the Court necessarily is preventing
12 us from making any kind of a showing apart from, of course,
13 Mrs. Blau.

14 THE COURT: Whose name and address is well-
15 known.

16 MR. BERGMAN: Right.

17 While I hesitate to impeach what might be my
18 own witness, whose credibility isn't that high with the
19 Court either, but in any event, those are the reasons
20 that we object to the order respectfully.

21 THE COURT: Very good.

22 Are we ready for sentence?

23 MR. BERGMAN: Mr. Intersimone is still
24 reading the report. C. we have a brief recess?

25 THE COURT: Why don't you read through it right

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2 now and I will just wait.

3 MR. BERGMAN: Thank you.

4 THE COURT: Mr. Beller, while Mr. Intersimone
5 is looking at this, I am refreshed in my own recollection
6 that there may be other jury inquiry going on at this
7 point or maybe contemplated.

8 Mr. Fisher made certain comments along that
9 line.

10 MR. BELLER: Correct.

11 THE COURT: It seems to me in light of my
12 observations on the law, as it has been made known to him
13 during the course of the day, that counsel should be
14 notified of this ruling which obviously applies across
15 the board.

16 MR. BELLER: I called Mr. Fisher before I came
17 to court because it had been my intention to make that
18 request, and I wanted to ask him when he had begun or was
19 going to interview the jurors.

20 He was out, but I will be glad to send a let-
21 ter to all counsel.

22 THE COURT: Could you do that?

23 MR. BELLER: Yes.

24 THE COURT: And there you can embody a page
25 from these minutes or the substance of my views.

1
2 If Mr. Fisher has anything to cause the
3 Court to set this machinery in motion, I will set it in
4 motion.

5 Mr. Bergman, you might say to your client
6 the only thing I am taking out of that report as bearing
7 upon the matters before me at this moment is the defend-
8 ant's record and his age, so unless there are other things
9 in there, I am not getting into the family situation.

10 You may be aware from me if a person is ar-
11 rested on some charge and there is no disposition, I do
12 not pay any attention to it. So you do not need to deal
13 with the rest. You just need to deal with the convictions.

14 Are we ready to go now? Is there anything
15 about these convictions that you want to dispute?

16 MR. KEEGAN: We are reading it together,
17 your Honor.

18 THE COURT: Can I have that report back then?
19 Mr. Beller, do you have anything that you want
20 to add?

21 MR. BELLER: No, your Honor.

22 MR. KEEGAN: I will speak for Mr. Intersimone.
23 Since your Honor has already indicated, I be-
24 lieve, that it will not regard any arrests not resulting
25 in convictions as having any bearing on the sentence, I

"H"

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2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 UNITED STATES OF AMERICA, :

6 Plaintiff, :

7 V. : 76 Cr. 324

8 FRANK MOTEN and SEBASTIAN
9 INTERSIMONE, :

10 Defendants. :

11 -----x

12 March 24, 1977
13 4:45 p.m.

14 BEFORE:

15 HON. RICHARD OWEN,

16 District Judge.

17 A P P E A R A N C E S:

18 ROBERT B. FISKE, JR., ESQ.
19 United States Attorney for the
20 Southern District of New York,

21 BY: DANIEL J. BELLER, ESQ.,
22 Assistant U.S. Attorney

23 IVAN FISHER, ESQ.,
24 EDWARD CHIKOFISKY, ESQ.,
25 Attorneys for defendant Moten

SEBASTIAN INTERSIMONE,
Appearing pro se

ALSO PRESENT:

PAUL ESPOSITO, ESQ.

2 (Case called.)

3 THE COURT: Mr. Intersimone, I am going to
4 address you now in your capacity as counsel for yourself,
5 all right. Mr. Esposito, you are here from Mr. Bergman's
6 office?

7 MR. ESPOSITO: Yes, your Honor.

8 THE COURT: You are aware I gather of the sub-
9 stance of a telegram which the court received which I will
10 mark as Court's Exhibit 1 in which Mr. Bergman is "dis-
11 charged" by Mr. Intersimone. You too apparently.

12 MR. ESPOSITO: Yes.

13 THE COURT: Mr. Intersimone, obviously you have
14 a right to be your own lawyer as you know but I do think
15 you ought to be aware of the fact that you have an enormous
16 task before you undertaking to do that, not the least of
17 which is in the Court of Appeals where the task of writing
18 a brief on your behalf has to be done and it seems to me
19 that somebody with legal skills and an ability to take
20 issues and to annotate them to the record and to do the
21 research and put the cases next to it, so in effect the
22 brief is written in the Court of Appeals for you and there
23 after effectively argued is something that in a case of
24 this nature really, you are much better served by having
25 a competent lawyer do it for you than in doing it yourself

2 You have a right to do it but I want you to be aware in
3 my judgment it is a mistake.

4 MR. INTERSIMONE: What is a mistake?

5 THE COURT: To try to argue an appeal.

6 MR. INTERSIMONE: I don't intend to.

7 THE COURT: You are just doing that before me?

8 MR. INTERSIMONE: No, no. I just discharged my
9 attorney Sunday afternoon, late afternoon, and I haven't
10 had time to get another one. I know I can get a lawyer.
11 I am not a lawyer. So I just need time to get one.

12 THE COURT: Now, the problem also then is this,
13 that having gotten today, you see, in this telegram you
14 say you are going to defend yourself.

15 MR. INTERSIMONE: At the moment I didn't know
16 what else to say until I got a new attorney. I don't know
17 if that telegram says I intend to get a new lawyer.

18 THE COURT: It does not.

19 MR. INTERSIMONE: Then it was an error.

20 THE COURT: It speaks in terms of you defending
21 yourself, and one of the problems we have is while it is
22 arguably that I don't even have jurisdiction to hear this
23 matter because it is in the Court of Appeals, nevertheless,
24 whatever happens here has to happen quickly because of the
25 are you on an expedited schedule, Mr. Beller, because of the

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2 number of defendants that are remanded and so on?

3 MR. BELLER: Yes, and the appellant's brief is
4 due April 13th, I believe.

5 THE COURT: You see, I therefore have time prob-
6 lems in terms of the handling of this very motion if it's
7 to be dealt with as an appellate matter as well. Therefore
8 I had expected in accordance with this telegram that I got
9 that you would be coming in and speaking for yourself today
10 because that's what you say to me. Are you prepared to go
11 forward today before me on these issues?

12 MR. INTERSIMONE: I am not prepared to go ahead
13 your Honor, because I am not an attorney. I know I will
14 fall flat on my face if I tried to argue law here. My
15 position right now is I would like to have time to get an
16 attorney. I had two previous attorneys, they cost me a
17 lot of money and unfortunately I had to discharge my last
18 attorney and I just have to have time to get another one.
19 I think I have shown good faith in the past and I think I
20 am showing good faith now.

21 THE COURT: Your papers are all filed so it's a
22 matter really --

23 MR. INTERSIMONE: I don't know what paper to
24 file as far as this particular issue is concerned. I don't
25 know anything about my appeal.

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2 THE COURT: Mr. Beller, I leave to the Court of
3 Appeals their problem. As far as today is concerned, do you
4 have any thoughts to guide us?

5 MR. BELLER: The first thing I think that should
6 be clear is that whatever the court does won't in any way
7 affect, obviously, and Mr. Intersimone should know that
8 what the Court of Appeals does with his motion to discharge
9 his attorney and whether that attorney is going to be re-
10 lieved.

11 I know the Court of Appeals has rather strict
12 rules about relieving counsel. I am quite sure they are
13 not going to be very eager -- there has already been one
14 motion to extend the time for appellants to file their
15 briefs. That motion has been denied. I don't believe the
16 Court of Appeals is going to be inclined to allow Mr.
17 Bergman to withdraw from the appeal.

18 If the Court of Appeals has that power, I would
19 suggest, taking this as a request on the part of Mr.
20 Intersimone to discharge his attorney, that it not be
21 granted or at least to have the attorney withdraw for pur-
22 poses of this motion and that if Mr. Intersimone -- Mr.
23 Intersimone ought to choose between going pro se or con-
24 tinuing with Mr. Bergman as his counsel for purposes of this
25 motion.

As your Honor noted, all of the papers have been submitted. On a technical view as a motion for a new trial I don't think Mr. Intersimone has standing. If this is taken as a motion to voir dire the jurors, Mr. Fisher has made the same motion and I gather while a ruling with respect to Mr. Fisher would only, strictly speaking, apply to Mr. Fisher and Mr. Moten, the court would still be empowered to prohibit counsel in the entire case from speaking to the jurors and so in that sense it would govern all of the defendants.

We don't know any reasons why Mr. Intersimone has discharged Mr. Bergman and that might be relevant. Is it for purposes of delay? Without suggesting that it is in any way, we really don't know what the reason for discharging Mr. Bergman was and certainly without some statement to that effect, all I am really saying, I guess, that the court, mindful of its own calendar problems and so on, I don't believe has to simply take a request to discharge a lawyer as putting an obligation on the court to grant that request. The same considerations that apply in the Court of Appeals I think would apply here.

MR. FISHER: Your Honor, may I make some observations?

THE COURT: Sure.

2 MR. FISHER: Most respectfully, your Honor, be-
3 fore this court today are matters preliminary to the issue
4 which the government contends Mr. Intersimone has a right
5 to present arguably today, whether or not the court will
6 grant us some access to the jurors. Those matters that we
7 have presented which Mr. Intersimone has not presented are
8 discovery matters.

9 Most respectfully, if we could argue the dis-
10 covery matters preliminary to the jury issue, access to
11 the jury issue today and if your Honor could give us a
12 ruling sometime within a few days, let's say, that ruling
13 might well affect the substance of our proffer with regard
14 to our position on our right to interview the jurors.

15 In other words, there might be forthcoming cer-
16 tain additional information which the court should properly
17 consider as part of our application for permission or access
18 to the jurors. As Mr. Beller points out quite correctly,
19 whatever delay that the court might grant in its discretion
20 to Mr. Intersimone today will have not effect whatever on
21 the appellant's case. It will not delay it in any way what-
22 soever so that we can proceed here independent of the appeal
23 pending in the Court of Appeals with no cause relation
24 effect.

25 MR. BELLER: I don't follow that. I must say,

2 your Honor, I didn't follow what Mr. Fisher said.

3 THE COURT: I am not quite sure I did.

4 MR. FISHER: All I mean to say is this, your
5 Honor. We have had discussions with some of the clerks
6 in the Court of Appeals. My understanding is your Honor
7 can hear the motion and if and when the court is ready to
8 enter an order, at that point we make application to the
9 Court of Appeals in a purely procedural formal way to re-
10 mand to the District Court merely for the purpose of enter-
11 ing the order.

12 THE COURT: Mr. Intersimone, I am placed by you
13 acts in a very difficult time bind and looking at this as
14 a situation where frankly all of the papers on both sides
15 are before me prior to your telegram, for whatever effect
16 it has as of this moment, and I am going to have to rule on
17 it apparently, I am going to say this, that Mr. Esposito
18 is here. If you wish him to argue this matter before me --

19 MR. ESPOSITO: Your Honor, may I say at this
20 time I am here despite the fact that I am mentioned in that
21 telegram. I have functioned very slightly on this matter.
22 My partner, Paul Bergman, is presently on trial in the
23 Eastern District. He asked me to come here for the purpose
24 of sitting in. I am not familiar with any of these motions

25 THE COURT: All right. I will tell you what.

1 I am going then to treat this motion as being a submitted
2 one in your behalf in that all the papers are before me
3 and I have the power to take it on submission. I will
4 take it on submission now because all the papers are be-
5 fore me. I have them before me and I will consider it on
6 the papers.
7

8 If, at some future time, you retain other coun-
9 sel and they wish to make a further application before me
10 with regard to any matter today, I will consider that as
11 and when it's made. But given the shortness of time here,
12 the imminence of the appeal, the fact that the case is in
13 fact fully submittable, I am going to treat it as being
14 submitted to me on the papers on your behalf.

15 I will give you any opportunity you want to
16 speak to me about it, keeping in mind, of course, that as
17 you say, you are not apparently even aware of the contents
18 of these papers that have been submitted by counsel on your
19 behalf, so govern yourself accordingly.

20 MR. INTERSIMONE: I have some papers.

21 THE COURT: Let's go ahead with the motion. I
22 will treat it as submitted by Mr. Intersimone. I will give
23 him whatever leave he wants to have to address me with re-
24 gard to it.

25 Mr. Fisher, go ahead.

1
2 MR. FISHER: Thank you, your Honor. If your
3 Honor please, I understand the issue before the court to-
4 day or issues before the court today relate to certain
5 discovery requests we made pursuant to a previously
6 articulated motion for a new trial under Rule 33, the
7 thrust of which motion relates to certain improprieties
8 that are alleged to have occurred prior to and during the
9 jurors' deliberations in this case. The motions before
10 your Honor seek discovery of certain unique circumstances
11 which have beclouded the jury deliberations, at least so
12 it has been alleged by us on papers.

13 We seek first, if your Honor please, pursuant
14 to Brady, and let me inject here that at no time have we
15 received a formal response to any of the discovery sought
16 by our file of notice of motion from the government and I
17 do not understand what their position is.

18 I have had an informal conversation with Mr.
19 Beller from which I assumed that the government consents
20 to the Brady motion but unfortunately he finds nothing to
21 respond.

22 THE COURT: I assume that that's so.

23 MR. BELLER: That's correct. Not all of the
24 requests but most of them. Shall I respond to those now?
25 That might save some problem.

1 THE COURT: Sure. Why not.

2 MR. BELLER: I did tell Mr. Fisher -- while he
3 says that he doesn't have any understanding of the govern-
4 ment's position, I did tell him at least two weeks ago
5 what our position was and I think he knows what your posi-
6 tion is.
7

8 As to why, number one, directing the government
9 to disclose any and all information now in its possession
10 or which through the exercise of due diligence can be
11 brought within its possession which tends to show whether,
12 as to A, without in any way conceding that Brady applies
13 to this situation, we are willing to say that as to A there
14 is no information in addition to anything in the papers
15 that has come to our attention. By papers I mean in the
16 submissions here.

17 As to B, there is no such information.

18 As to C, there is no such information.

19 We oppose the unsealing requests in number 2 and
20 3. Those papers have continued under seal. It's been a
21 matter that's been before the United States Court of
22 Appeals and in the decision handed down on March 17, 1977,
23 copy of which I will hand up to the court in the matter of
24 the grand jury subpoena served upon David Doe, the Court
25 of Appeals affirmed the orders of the district judges

2 requiring his testimony with respect to this matter.

3 There were also matters with respect to seal in
4 those proceedings. Apparently the Court of Appeals didn't
5 see fit except in its own review of some of the facts, to
6 require unsealing. Therefore, we would continue to take
7 the position that these documents should remain under seal.

8 I should add, however, that as to those particu-
9 lar documents -- let me say, as to number 2 which requests
10 unsealing as to pages 4177 through 4193, I have examined
11 them and I find no Brady material. That is what Mr.
12 Fisher characterized as Brady material. I find no infor-
13 mation in there that will be helpful to the defendant's
14 motion in this case.

15 THE COURT: Was that the proceeding before me
16 on that Monday morning?

17 MR. BELLER: Correct, your Honor.

18 THE COURT: I see. Go ahead.

19 MR. BELLER: As to number 3, I have not re-
20 viewed any charging instructions as of this time. I tried
21 to obtain a copy of it prior to coming down but was unable
22 to get in touch with the assistant who has them. I would
23 oppose unsealing except to the extent that it contains any
24 material which might be helpful to these defendants in the
25 making of their motion.

I would represent now that I do not believe that there is any such information in that charging instruction, if it exists.

THE COURT: Mr. Beller, before I leave 3 because you have me sort of -- 2. I have no problem with 3, with denying the request.

As to 2, that was my inquiry of certain parties of that morning having been informed of certain things, is that right?

MR. BELLER: That's correct, your Honor.

THE COURT: The only rationale for unsealing this is that it is some evidence that might assist parties here in convincing me or an Appellate Court that the jury had been otherwise affected, right?

MR. BELLER: Correct.

THE COURT: On that basis I am sustaining the government's position and deny the unsealing.

MR. BELLER: As to 3, we take the same position and I will make an additional attempt to review the paper. To my knowledge --

THE COURT: This is 3?

MR. BELLER: Correct.

THE COURT: It seems to me 3 is something that -- well, do I have to review those?

2 MR. BELLER: I am actually talking about the
3 complaint at this time, your Honor. Only with respect to
4 the complaint which may have information in it that is lea
5 ing to the probable cause. I believe that should remain
6 under seal but to the extent that it may, I am at this
7 moment 100 per cent sure that it doesn't contain any infor
8 mation which will give any assistance to these defendants
9 in pursuing their motion, but I am certainly willing to
10 look at it again and make sure of that fact. Otherwise I
11 would see no basis for unsealing it.

12 THE COURT: Maybe in the interest of the record
13 you ought to get those to my chambers so I can have a look
14 at them.

15 MR. BELLER: Fine, I will do that.

16 As to 4, we have already submitted papers and
17 we are prepared to argue on that issue.

18 As to 5, we will take -- 5 is granting leave to
19 file such other and further motions. I would oppose that
20 but at some later time we can respond.

21 MR. FISHER: Of course, I have listened to the
22 court's rulings and of course I disagree with them. I
23 think the record should reflect that at no time have I
24 ever been advised of any reason whatever for the continua
25 tion of the sealing of the proceedings before your Honor,

2 referring to the interview of former Juror Keno and,
3 secondly, I know of no reason ever proffered for the con-
4 tinuation of the sealing of the proceedings pending against
5 former Juror Keno as well. The purpose of that statement,
6 for the record, your Honor --

7 THE COURT: Let me ask you this. These were
8 only sealed under 2. This was only sealed at that time
9 in order to endeavor to preserve the sanctity of the balance
10 of the jury, right?

11 MR. FISHER: Right.

12 THE COURT: In addition to that, at the present
13 time it seems to me it is appropriate to continue them
14 under seal because there is a criminal prosecution in-
15 volved in this and the government at this point is not
16 under a requirement to grant discovery as to anyone until
17 that day arrives. The only reason it seems to me you would
18 be entitled to 2 is if what is revealable under that bears
19 upon the goal you are trying to reach here, which is that
20 other jurors are tainted. I have in my mind a rather
21 vivid memory of that morning and I don't see that this
22 bears upon that or would aid you to that goal. Therefore
23 I decline to do it.

24 MR. FISHER: Most respectfully, your Honor, that
25 portion of the proceedings which we seek disclosure of

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2 at this time relates solely to what Mr. Keno said to your
3 Honor on that day. The rest, so far as I know, has already
4 been disclosed as a result of filings in the Court of
5 Appeals and that we have.

6 The point I am making is with regard then to di
7 covery to be denied to Mr. Keno or his lawyers, the point
8 is Mr. Keno knows or should know what he said to your
9 Honor.

10 Further, as I understand it, your Honor, the
11 burden is on somebody in seeking a sealing alleging some
12 bona fide reason why the matter should be sealed that was
13 conducted by a court in this jurisdiction.

14 Furthermore, the fact that a case is pending,
15 a criminal prosecution is hardly dispositive. All the
16 cases before your Honor, all the criminal cases are pend-
17 ing and generally nothing in them is sealed absent a very
18 strong and compelling reason.

19 THE COURT: You are moving for this. You have
20 to show me some reason why you have standing to ask for it
21 when my memory of the minutes reflects that it doesn't take
22 you any step toward your goal.

23 MR. FISHER: Your Honor, it is our contention
24 that at the time Mr. Keno approached Yolanda Intersimone,
25 she was in the company of another person we believe to have

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2 been Juror No. 2 in this case.

3 THE COURT: Mr. Beller, do you have those minutes
4 here?

5 MR. BELLER: I am sorry. I have them upstairs,
6 your Honor. Could I say this, your Honor? We take the
7 position that there is nothing in any of the sealed
8 minutes that relates to the defendant's motion. We would
9 be happy to submit that to the court for your Honor and make
10 it a part of the record.

11 THE COURT: Let me look at them again. My
12 memory is there is nothing in those minutes that deals
13 with any other juror. If I am correct on that, then there
14 is no basis for turning them over.

15 MR. BELLER: I would just point out, your Honor,
16 for example, while a defendant may be entitled to his own
17 statements, no other attorney is entitled to those state-
18 ments. Mr. Fisher is asking for disclosure of Keno's
19 statements and he is not entitled --

20 THE COURT: I think I put on the record why I
21 am not turning them over.

22 MR. BELLER: Mr. Fisher states that he has other
23 documents. If we knew what those were, we wouldn't have
24 to submit them to the court. Could he tell us what those
25 are?

2 MR. FISHER: I don't know what Mr. Beller is
3 referring to.

4 MR. BELLER: Mr. Fisher said with respect to
5 these sealed court documents, he stated he is only con-
6 cerned with what Mr. Keno said and not with anything else
7 because he has those other documents and I would like to
8 know what documents he has so we don't have to submit,
9 since those are not part of his request for discovery
10 since he has them. It will aid us in making a submission
11 to the court.

12 MR. FISHER: There was an in camera proceeding
13 in response to Mr. Beller's inquiry held before your Honor
14 prior to the court's interview of William Keno. Partici-
15 pating in that were the court, Mr. Beller, Mr. Keegan.
16 I am referring to a four-page proceeding at which those,
17 the aforementioned people, were present and in which Mr.
18 Keegan made a certain disclosure to your Honor.

19 I understood that the court originally sealed
20 those papers. I sent someone to the Court of Appeals the
21 day these applications were filed. We merely asked for
22 whatever it was was filed in the Court of Appeals. We were
23 given those documents and those are the ones to which I
24 refer.

25 THE COURT: You have those papers?

1 MR. FISHER: Yes, sir.

2 MR. BELLER: Just so our response is clear,
3 your Honor. As Mr. Keegan pointed out in his affidavit,
4 Mrs. Intersimone did at various times make certain state-
5 ments. I don't believe that since the defendants already
6 know about those statements, I gather that that's not part
7 of the request here.
8

9 In any event, we are not going to turn those
10 over. We believe we are not required to turn those over
11 since what she stated with respect to other jurors is
12 already contained in the affidavits and we will make part
13 of the record her grand jury testimony and other such tes-
14 timony which relates to this issue.

15 MR. FISHER: Whose grand jury testimony?

16 MR. BELLER: Whatever grand jury testimony re-
17 lates to the issue.

18 THE COURT: That brings us to item number 4.

19 MR. FISHER: Prior to that, if I may, your
20 Honor. As a result of the opinion of the Court of
21 Appeals to which Mr. Beller just referred, In Re David
22 Doe, decided March 17, 1977, we have been put on notice as
23 to the existence of other sealed material of which we would
24 ask disclosure.

25 THE COURT: I don't know what you are talking

2 about.

3 MR. FISHER: Yes, your Honor. The Court of
4 Appeals' opinion to which I just referred --

5 THE COURT: I'm aware there was reference to
6 that but those are things that are not before me with any
7 specificity- so I don't have the slightest --

8 MR. FISHER: I am about to attempt to put it
9 before you with specificity if I may, your Honor.

10 THE COURT: This is something that somebody
11 applied to Judge Pierce for and could not get?

12 MR. BELLER: Correct.

13 THE COURT: Why is that before me?

14 MR. FISHER: It's before you, your Honor, be-
15 cause I understand that there are two documents, affidavit
16 by Mr. Flannery and by Mr. Keegan in which each attempts
17 to summarize as best each declarant could the substance
18 of a conversation had between these two men with regard
19 to I think Mr. Bernard Brightman and what he is alleged to
20 have said to Mr. Intersimone, who is alleged to have said
21 it to Mr. Keegan.

22 It is possible, your Honor, and again since we
23 don't have access to these materials I cannot know for
24 sure, that this material might well contain information
25 relating to the possible existence of another juror

2 involved in a criminal scheme to suborn the jury, bribe
3 it or at least that another juror was aware of such a
4 scheme.

5 THE COURT: Mr. Beller, should I look at those
6 in camera?

7 MR. BELLER: For only the reason the same way
8 Mr. Fisher obtained the sealed documents that apparently
9 he has in his possession, it seems to me without making
10 the slimmest showing that in these documents there is
11 supposed to be something relating to this issue, he wants
12 disclosure of documents which the Court of Appeals itself
13 has said are sealed and even at least with respect to those
14 documents, exercised some restraint in not disclosing their
15 contents.

16 I have asked Mr. Flannery whether there is any-
17 thing in the investigation which would support the claim
18 made by these defendants and he told me that there is
19 nothing in his investigation and therefore I don't believe
20 that these documents should be submitted for any reason.
21 I am trying to stay as far away from that investigation as
22 I possibly can. Mr. Keegan is only available to the defen-
23 dants because they submitted his own affidavit. He is
24 perfectly willing to tell them, I am sure, what he told
25 John Flannery, and Flannery's affidavit is simply a relation

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of what the conversation was.

MR. FISHER: Mr. Beller is inaccurate, most respectfully. I did conver with Mr. Keegan who explicitly refused to disclose to me the contents of that interview and I can so represent to the court.

MR. BELLER: That may very well have been because it was prior to the decision by the Court of Appeals that it wasn't privileged but it simply related to ongoing criminal activity.

MR. FISHER: Not at all. It was yesterday morning, your Honor.

MR. BELLER: I decline to do so, your Honor, unless required by the court. There is no showing here whatsoever that anything in those affidavits relates to the issue that's raised by these defendants. I am representing that I have already been advised there is nothing in the investigation --

THE COURT: Let me put it this way. This is an affidavit of Keegan's. He, at best, is a hearsay conveyor of what Mrs. Intersimone told him and --

MR. BELLER: In fact, your Honor, I don't even know -- I am not even sure the contents of the affidavit --

THE COURT: At best, he is still a hearsay conveyor and even Flannery is even one step further remove

2 I would assume.

3 I will deny your request as to those two affi-
4 davits.

5 MR. FISHER: In addition, if your Honor please,
6 we would request disclosure of grand jury testimony of
7 David Keegan which I know to be in relation to generally
8 the matter before the court today, proffered before the
9 grand jury in the Southern District on Monday of this week,
10 this past Monday.

11 THE COURT: The government having made the Brady
12 representation, I take it that includes anything Mr.
13 Keegan may have said; is that right?

14 MR. BELLER: Actually I haven't checked with
15 Mr. Flannery because on that testimony, if there was such
16 testimony -- and I will do that.

17 THE COURT: If you will do that, please, and I
18 will otherwise deny the application.

19 MR. FISHER: If your Honor please, I do not now
20 intend to belabor the discovery request but since it will
21 relate to the larger issues before the court, I would like
22 the court's permission to respond to this hearsay char-
23 acterization applied by the court to Mr. Keegan's disclosures.

24 In that regard generally, it is a well known
25 principle of law that hearsay can be admitted even in a

1 criminal trial before a jury where there are inherent
2 inditia of reliability. First of all --

3
4 THE COURT: You don't urge this goes anything
5 beyond the incident in front of the drug store?

6 MR. FISHER: Yes, I do. The whole purpose of
7 the Court of Appeals litigation had nothing to do with the
8 Ms. Yolanda Intersimone situation. It related entirely to
9 an ongoing criminal investigation involving Bernard Bright
10 man and --

11 THE COURT: I know, Mr. Fisher, but your motion
12 before me is predicated on the hope on your part that this
13 jury was in some fashion tainted.

14 Now, as I listen to Miss Blau's tape taken in
15 Mr. Bergman's office, they go into that again and again and
16 she doesn't say one word about anybody having the slightest
17 idea that anybody was tainted. Am I right about that?

18 MR. FISHER: No.

19 THE COURT: How am I wrong about that?

20 MR. FISHER: Firstly, your Honor, with regard
21 to the tape to which your Honor refers, the tape recording
22 made in Mr. Paul Bergman's office of an interview of Miss
23 Blau I think on or about January 14, 1977, I discussed
24 this with Mr. Beller as a procedural point and we ought
25 to deal with it, I think.

2 As the court has pointed out, and quite
3 accurately I would stipulate, the audibility of that tape
4 is from poor to horrible. In view of that there is nothing
5 on the record which would indicate that which the court
6 thinks it can hear as opposed to that which I think the
7 court or I can hear or what Mr. Beller thinks he could
8 hear. And I think the record would be in an impossible
9 state, particularly since the court just attempted to
10 rely upon the tape and I tell you frankly I intend to rely
11 on the tape in my arguments here today. I think what we
12 need for the purposes of clarity today at least is a ver-
13 sion of the tape to which all parties can agree is accurate.

14 THE COURT: No, I don't think that's so. You
15 can use that tape for whatever you can hear on it. I took
16 it home where I have a couple of AR speakers and a good
17 amplifier and I ran it and I heard a lot of it rather well.
18 I did not hear other parts of it rather well at all. I
19 heard parts of it rather well. I don't hear anything that
20 gives you any support in this regard and I think we ought
21 to get fairly quickly down to what it is that you urge here
22 because I have to leave at 5:30. At 5:30 I have to ter-
23 minate the session right on the nose.

24 So, I think we ought to get very quickly to the
25 issues of why you feel you are entitled to interview other

2 jurors to determine whether they have been tainted, which
3 is what it amounts to.

4 MR. FISHER: All right, there are two separate
5 thrusts and let me say preliminarily that I have found no
6 case authority whatever, either in this circuit or any
7 other directly dealing with the issue of how strong a
8 showing must be made in order to obtain the hearing we
9 seek.

10 The cases that come close to the area is United
11 States against Driscoll, as an example, cited by the govern-
12 ment in opposition, go to an issue which we can distinguish
13 satisfactorily from the request before this court. Dris-
14 coll points out, and other cases have as well, that the
15 courts should be unanimous in their disapproval of any
16 random fishing expedition by counsel with regard to post-
17 verdict inquiries of jurors.

18 Furthermore, Driscoll and the other cases are
19 properly concerned with unethical types of conduct, mis-
20 leading jurors and the like. These kinds of problems are
21 properly before this court's consideration now.

22 To refine our request, as I think I must, I
23 seek for Mr. Moten the right to interview the jurors. I
24 will, your Honor, if granted that access, conduct those
25 interviews myself. I will not come back later with a

2 Tinkers to Evers to Chance passing the buck explanation
3 for alleged improper conduct during those interviews.

4 I represent to the court that I have familiar-
5 ized myself with the appropriate canons of ethics and the
6 case in that area. What I am --

7 THE COURT: Let's go first to why you should.

8 MR. FISHER: Because there are two very grave
9 suspicions, at least, and strong showings at best with
10 regard to two different kinds of impropriety. We have
11 begun with the jury bribing situation involving former juror
12 William Keno. At this time the record reflects that there
13 is information or proof before your Honor in one form or
14 another as to the following: Keno did in fact attempt to
15 bribe or reach a juror. I am sorry, a relative of the
16 defendant in that trial, Mr. Intersimone. Some short time
17 before that application to Yolanda Intersimone, Keno
18 apparently or possibly was responsible for whatever over-
19 ture was made to Mr. Bernard Brightman which we have heard
20 about through the disclosure of Mr. David Keegan.

21 Now, I think the one, the Intersimone situation
22 following close chronologically upon the heels of the Bright-
23 man situation suggests a continuing concerted effort on
24 the part of Mr. Keno to obtain money for the subornation
25 of his jury verdict.

2 In addition, your Honor, as we have averred in
3 our affidavit and I submit whether or not something is
4 hearsay is not the dispositive consideration as to whether
5 or not there is a sufficient showing before your Honor
6 because we are not dealing with a hearing. We are not
7 even talking about a request for a hearing. We are talk-
8 ing about some showing to justify our right to interview
9 jurors.

10 Now, we have information that Juror Keno had
11 approached people requesting money, not only for himself
12 but for, quote, other jurors, unquote, who were still on
13 the jury.

14 THE COURT: What is your information?

15 MR. BELLER: Your Honor, could I say that as
16 I understand it, the papers are in. I would ask that the
17 question be what's the information that's in the record
18 before us in the papers.

19 MR. FISHER: If your Honor please, the infor-
20 mation to which I refer has been alleged in our original
21 affidavit in support of this motion. Mr. Beller did in
22 fact inquire of Mr. Bergman as to the source of Mr. Berg-
23 man's information. He didn't choose to inquire of me and
24 I think at this time that's an inappropriate objection.
25 There is a gentleman, your Honor, who is very, very ill.

2 I am advised he is suffering from terminal cancer, who was
3 interviewed by someone at my request.

4 THE COURT: I think Mr. Beller is right. If you
5 are going to argue something before me it has to be before
6 me in some competent form.

7 MR. FISHER: It is before the court in my affi-
8 davit.

9 THE COURT: Where?

10 MR. FISHER: Inviting the court's attention --

11 THE COURT: The affidavit of 18 February?

12 MR. FISHER: Yes, your Honor.

13 MR. BELLER: This is that paragraph 6, right?

14 MR. FISHER: Yes, your Honor.

15 THE COURT: I can't credit that.

16 MR. FISHER: Most respectfully, your Honor, I
17 would like the opportunity to brief that issue, the issue
18 being whether or not an affidavit of an attorney is some-
19 thing which the court in its discretion could credit. I
20 submit there is nothing before your Honor to discredit my
21 affidavit as to what I said I found out.

22 THE COURT: I would not credit that.

23 MR. FISHER: I want the record -- I think it
24 reflects our --

25 THE COURT: If you said to me there is a relative

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2 conversations with Yolanda Intersimone, the substance of
3 which was she was very, very close, just about very sure
4 that a person in the company of Mr. Keno at the time of
5 his approach to her was another juror, Juror No. 12.

6 Now, that read in connection with Ms. Blau's
7 letter in which she points out that Juror No. 12 and Keno
8 were very, very --

9 THE COURT: 2, 8 and 10 used to go out to lunch
10 together apparently, right?

11 MR. FISHER: 2 and 10.

12 THE COURT: There were the three of them as I
13 remember hearing here -- or seeing her affidavit. The
14 three of them of Hispanic background, was the way she put
15 it, if I am not mistaken. Am I right, Mr. Beller?

16 MR. BELLER: She says that 2, 8 and 10 used to
17 go to lunch.

18 THE COURT: They were luncheon companions with
19 each other. The mere fact he may have been walking on
20 Broadway with 2 and these two arguably who talked to
21 Yolanda Intersimone doesn't seem to me to be a basis for
22 talking to anybody and she doesn't even know whether it's
23 2 or 10, she very forthrightly said at one point when it
24 was reported to me she wasn't prepared to identify who it
25 was

MR. FISHER: Your Honor, there is much more to that incident than that. We have here at least the allegation that a juror explicitly and just totally violated a very important court direction, I'm sure repeated numerous times through this trial, not to communicate directly or indirectly with any of the parties or lawyers to the litigation. It was, according to Ms. Yolanda Intersimone, a very deliberate violation of that coupled with the promise that he would repeat the overture.

Subsequently she advises the court on Monday, the 20th, that she then recalled that Juror No. 10 said that he would meet Intersimone that following Monday during the lunch hour. That is a lot more than a casual conversation and the fact that Ms. Intersimone recalls that Juror No. 10 was in the company of another juror at that point in time and that they left together, in view of the very serious impropriety suggests a lot more to it than that, particularly when considered in light of the court's subsequent voir dire of the jurors in this case, a subject I will address a little later, and the denials of Jurors No. 2 or 10 with regard to any improper contacts.

We are talking about something which was improper in view of the court's rulings at best, and outrightly illegal at worst. We are talking about what might

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well wind up to be, your Honor, an outrageous attempt to buy off a jury considering the guilt or innocence of 22 or so people.

THE COURT: Well, we are talking about whether the 12 jurors that finally decided this case were infected. That's what we are talking about.

MR. FISHER: That question leads directly to the other one, your Honor.

THE COURT: That's the main question. What else do you urge upon me as a factual basis for granting the relief you seek, which is to interview 11 other jurors?

MR. FISHER: In addition to the Keno situation, if I may characterize it as such, your Honor, there is the publicity question as well. On this we rely primarily, of course, on the statements of Ms. Blau contained both on the tape we have discussed and in her letter which has been marked as Exhibit B of Mr. Bergman's previous submission.

THE COURT: This applies to one Antonio Alvarez.

MR. FISHER: Not exclusively, as Mr. Beller contends in his memorandum, and this is why --

THE COURT: I thought she said --

MR. FISHER: Your Honor, I had occasion to re-view the tape myself several times. She states on the tape, no, it was mainly Juan Alvarez. Unfortunately my counters

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on my machine are not going to be helpful to the court.
I am in a position to play the tape.

MR. BELLER: I could consent that the tape does
read no, was mainly -- my hearing of the tape says the
same thing. "No, it was mainly Juan Alvarez," and she
goes on.

MR. FISHER: "Mainly" means not entirely, which
is in direct contradiction to the government's view of the
tape in its papers where Mr. Beller points out, I think
erroneously, that she excludes anyone else. Not at all.

That's all I have, your Honor. I got into this
case after your Honor's ruling. I have not been able to
interview the jurors and I haven't. The only access to
Ms. Blau I have had is indirectly and over a great deal
of encumbrances through Mr. Bergman's investigation.
In addition, your Honor, the newspaper articles them-
selves --

THE COURT: There was really only one that's
relevant. That's the second one.

MR. FISHER: I will submit that both are rele-
vant.

THE COURT: If they are both relevant, then I
have to assume that the jurors were lying to me when they
were voir dired. Right?

2 MR. FISHER: Your Honor, all the cases that deal
3 with this subject, just about all of them come up in a
4 post verdict posture frequently where there has been a
5 previous voir dire where jurors have originally denied
6 exposure to publicity but there are two issues.

7 The first is assuming Ms. Blau's statement on
8 the tape and the letter before the court to be accurate.
9 First, what did Jurors 2 and 8 learn in the newspapers?
10 And second, what did they say they learned to the other
11 jurors?

12 Both, we would argue, are impermissibly before
13 the jury. Both fall within the Marshall Maddox exception
14 to the secrecy of jury deliberations rule as codified in
15 606B of the federal rules of evidence.

16 Furthermore, by virtue of our lack of access to
17 the jurors, we do not know now whether the exposure is
18 only to Spanish language newspapers. Of course, if that's
19 what's stated on the tape, then I agree to that, but that's
20 not what is stated in the letter, the second page of the
21 letter. It's not limited to Spanish language newspapers
22 and I don't know. I do know that the April 23, 1977 argu-
23 ment has a headline that 33 were accused of \$600 million
24 drug trafficking and that the first paragraph of the
25 article does in fact refer to the allegation that there

2 was heroin and cocaine valued at more than \$600 million
3 as part of this conspiracy.

4 I do not think that that evidence was proffered
5 before this court, nor --

6 THE COURT: The jury did have before it evi-
7 dence of enormous value of both cocaine and heroin. The
8 headline says they are charged with it. That certainly
9 is no worse than the government's opening statement which
10 says we charge you with this, that and the other, right?

11 MR. FISHER: Most respectfully, not quite, your
12 Honor, in that I don't believe the government opened -- I
13 wasn't here but I don't believe the government opened on
14 the claim there was \$600 million worth of narcotics in-
15 volved in this conspiracy and I don't believe it was ever
16 proven or attempted to be proven to be anywhere near that
17 amount.

18 THE COURT: It was proven to be an enormous
19 amount of money that Mr. Moten was running through the
20 account up in the Chase Manhattan Bank, if I remember cor-
21 rectly were substantial sums weekly, 10, 20, 30, 40, as
22 high as \$50,000.

23 MR. BELLER: I would say, your Honor, if any
24 juror wanted to figure it out from the proof of what the
25 cost of an ounce was and what the quantity was at the trial

that the figure here probably understates the value.

THE COURT: The proof was just enormous quantities of narcotics and enormous quantities of money, if you want to credit it, which obviously they did. Go ahead.

MR. FISHER: Obviously they did to some extent and didn't to another. After all, Alvarez was acquitted of the 848 and Mr. Moten was not convicted on it either.

THE COURT: And Nelson Alvarez was acquitted and M.P. Morgan was acquitted and a few others.

MR. FISHER: Further in that article, your Honor, the article points out that Antonio Alvarez was detained. That area becomes much more serious when we consider the August article which talks about a specific amount of bail and I will get to that when we get to the second article.

THE COURT: I don't think you really need to argue that because the jury heard and the jury was aware of the property he put up, which was substantial, so they were given that as proof of the flight. Am I correct in that?

MR. BELLER: Correct, your Honor.

MR. FISHER: The April 23rd article in the third paragraph purports to give us a hierarchy of the defendants involved. The indictment does not do that. If the evidence

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does, that's something the jury should decide on its own without the help of the friendly neighborhood reporter.

But more than that, your Honor, the August article relates to a specific amount of bail, \$500,000 in bail, as I recall. Furthermore, now, of course, the value of the drugs alleged in the conspiracy is reduced by \$400 million to \$200 million. The following paragraph appears, and I quote:

"The federal agency in charge of the arrests described it as the most important arrest in the nation of drug traffickers."

Assuming, and we can't, but assuming that the only articles seen by Jurors 2 and 8 were the ones just described for your Honor, there is enough in there to taint them, I submit, particularly the last quotation I read to the court, that paragraph in which they state that the federal agency regards it as the most important arrest in the nation of drug traffickers, but I submit we cannot assume that that's all that they saw.

The next question becomes what did they then tell the rest of the jurors. According to Ms. Blau they assured the rest of the jurors that mainly about Alvarez, they knew all about him and they credit their source of information to newspaper articles which I assume, which I submit legal.

2 is tantamount to having the articles right there in the
3 jury room. A juror comes in and says, I read A, B, C, D
4 in the newspapers yesterday about this case. I submit in
5 terms of the legal question involved, it's as good as
6 having that article before the jurors.

7 We point out in our papers, and it bears re-
8 peating here, the allegation goes on to state that this
9 occurred right at, right during the deliberations at a time
10 when Jurors No. 2 and 8 were arguing vociferously for con-
11 victions and in support of that effort they recite news-
12 paper articles. Again, we don't know whether or not
13 Alvarez was the only one complained of in these terms as
14 to how prejudicial information was credited to newspapers.
15 We know that Ms. Blau said mainly about Alvarez, not neces-
16 sarily exclusively.

17 Bearing in mind the people conducting the inter-
18 view of Ms. Blau at that time had no interest whatever in
19 Mr. Moten, I submit the record makes enough of the sug-
20 gestion that further inquiry would indeed be appropriate.

21 THE COURT: Mr. Fisher, how much longer are you
22 going to be?

23 MR. FISHER: About five, ten minutes, your Honor.

24 THE COURT: Five minutes.

25 MR. FISHER: Generally speaking, one should not

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2 be permitted to interview anybody who might have relevant
3 information with regard to the processes of the case.
4 There are exceptions and this is one of them.

5 THE COURT: The cases are very clear that this
6 is not to be permitted unless there is a basis for it.

7 MR. FISHER: The only cases which forbid it,
8 your Honor, have forbid it where there is just a whole-
9 sale fishing expedition where there has been no attempt
10 whatever to delimit the inquiries to legitimate issues.
11 In the cases that the government relies on the only ones
12 that exist, that has never been presented.

13 I am here asking for the right to interview
14 jurors about two matters and two matters only. Whether
15 or not there was someone else advised of or aware of a
16 possible bribe attempt and whether or not prejudicial
17 newspaper publicity was brought to the attention of the
18 jurors, and that's it.

19 I am further here saying I represent if given
20 the authority, will conduct the interviews myself and I
21 further state to the court that I would obviously accept
22 whatever reasonably strictures or limitations the court
23 would impose. I furthermore invite the court's attention
24 to what must be a very, very serious possibility and that
25 is the government in its investigation of the Keno matter,

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2 I would imagine, would be interviewing the jurors at some
3 point themselves. The court's order precludes that as a
4 possibility.

5 May I a moment, your Honor?

6 THE COURT: Sure.

7 MR. FISHER: Your Honor, Rule 606 in the com-
8 mentaries at page 30, I believe, cites with apparent
9 approval a Court of Appeals decision in People V. DeLucia
10 where the Supreme Court holds that a particular series of
11 events when proven violates a defendant's constitutional
12 right. Implicit in that determination is the right of the
13 defendant to prove facts substantiating his claim.

14 You have denied thus far access, any access, to
15 the jurors. I have spoken with Mr. Keno's attorney. His
16 associate is in court today. He has, obviously, advised
17 me his client doesn't wish to discuss the subject with me.
18 Juror No. 2 may well have been involved in a criminal plan.
19 I cannot get at the proof, your Honor, I am asking for the
20 right to prove it and on the present state of the record
21 there is nothing that could be more conceivably forthcoming
22 at this point.

23 I have nothing further.

24 THE COURT: I just want to observe. You say that
25 but on the other hand following the removal of Mr. Keno, I

2 voir dired the jury. The questions which counsel in the
3 courtroom carefully considered with me in addition and
4 everybody, each of the jurors answered in a way that
5 allowed their remaining.

6 In addition to that, you had the opportunity to
7 talk to, somebody has had the opportunity to talk to,
8 which is now in your possession, to talk with Ms. Blau at
9 enormous length and to learn from her all of the details
10 of the proceedings in the jury room. So to say that you
11 are being denied knowing what's going on, that just plain
12 isn't so. What you really want to do is you want to go
13 beyond Ms. Blau and see if you can't get something out of
14 somebody else.

15 It seems to me if Ms. Blau wasn't able to give
16 you what you are looking for, give defense counsel what
17 they are looking for, certainly from where I sit as of this
18 moment, I am going to reserve decision but I certainly
19 don't see anybody can claim they haven't had a window into
20 that jury room that is a pretty big window because Ms.
21 Blau isn't reluctant to talk to anybody about what went on
22 in there. She wrote me letters. She was interviewed by
23 Marcia Cramer and others in the press office. She spoke
24 with Mr. Bergman on tape, not knowing she was on tape and
25 so on.

2 All right --

3 MR. FISHER: Your Honor, may I respond very
4 briefly?

5 THE COURT: One second.

6 MR. FISHER: Your Honor, first of all, we should
7 not be held limited by others' exposure or access to Ms.
8 Blau. Mr. Bergman thought nothing of the possibility of
9 the prejudicial impact of newspaper publicity. Also at
10 the time your Honor was conducting your voir dire of the
11 jurors you pointed out that the questions were carefully
12 considered by counsel. They were. Of course, most of the
13 counsel, in fact each except for Mr. Keegan was absolutely
14 unaware of what was going on so to whatever extent they
15 gave this court advice they did so in great ignorance.

16 THE COURT: They were aware that a juror had
17 misconducted himself and the question was whether others
18 had been touched.

19 MR. FISHER: They were unaware of the Brightman
20 situation --

21 THE COURT: They were unaware that a juror had
22 made an impermissible approach. I remember that distinctly
23 because it got onto the record in a way that I was a little
24 bit distressed about at the time, if I am not mistaken.

25 MR. FISHER: Most respectfully, Judge, any

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approach is an impermissible one. When you were conducting that voir dire, your Honor, you had to be careful not to inject into a juror's thoughts a thought that wasn't there. So your voir dire was only a lot more limited than one that could be conducted now would be.

And finally when you inquired of Juror No. 2, the one upon whom our suspicion focused at page 4222 of the record, you asked the last question, "In line with that have any of you jurors been discussing the merits of this case amongst each other?"

"No.

"You have not?

"No. We have been talking about something else.

I assure your Honor, if I were there I would have found out, if I could, if the court would have permitted, what that something else was what they were all talking about, but that's an example of the difference between the when your Honor is in the middle of a trial when your Honor has other interests to protect and now.

THE COURT: The something else is of no interest to me.

Mr. Intersimone, I am going to give you about three or four or five minutes here. Incidentally, what I said about you in the Court of Appeals which you now say

2 you are going to get a lawyer applies equally to you in
3 this court. You are better off with a lawyer and you are
4 obviously aware of that.

5 MR. INTERSIMONE: Yes, I am. I just want to
6 say to your Honor, I understand that my sister's statement,
7 something was said about my sister making a statement. I
8 wanted to know if that statement was submitted to a court.

9 THE COURT: I am not sure which statement you
10 are talking about.

11 MR. INTERSIMONE: I heard somebody say something
12 about Hispanic.

13 THE COURT: No, that was Ms. Blau's statement.

14 MR. INTERSIMONE: Also when you were referring
15 to or Mr. Fisher was referring to this issue here, includ-
16 ing me in that, I have the same goal Mr. Fisher has, of
17 course, but I don't know if our approach will be the same
18 or should be the same or what have you because I'm not
19 aware entirely of what's going on here.

20 That's one of my reasons for relieving Mr. Berg-
21 man. I prefer not to go into it in depth as far as that
22 goes because I like Mr. Bergman personally but I would not
23 like to go into anything else on it. I don't know if I
24 should make an appeal here or in the Court of Appeals about
25 a lawyer.

2 THE COURT: You govern yourself accordingly.
3 I can only deal today with what's before me.

4 MR. INTERSIMONE: Your Honor, I don't have all
5 the affidavits submitted to this court in reference to the
6 hearing. I don't have Mr. Fisher's and I don't know if he
7 has any of mine.

8 THE COURT: He does.

9 MR. INTERSIMONE: I don't have his. I don't
10 know if I have all the affidavits or motions submitted to
11 you. I wonder if I could get them, if it's possible for
12 me to get them.

13 THE COURT: Why don't you take that up with Mr.
14 Bergman who I am sure will furnish you with all of those
15 copies. Mr. Esposito nods his head yes. I have all the
16 papers in the courtroom so I am going to consider all of
17 them.

18 MR. INTERSIMONE: Your Honor, you say I have an
19 opportunity to come back if I do retain an attorney.

20 THE COURT: If there is something additional to
21 bring to my attention, absolutely.

22 MR. INTERSIMONE: I haven't had an opportunity
23 to dispute anything here or to present anything. I can't
24 go by what Mr. Bergman says because I am not satisfied
25 with him. I feel more should be added and I feel the

2 approach should be entirely different. I have a completely
3 different theory on it. This is one of the reasons I had
4 to relieve Mr. Bergman. Things were done without my per-
5 mission. Things were done without my consultation, with-
6 out my authorizing them. This is why I had to take the
7 step I did.

8 THE COURT: As of tonight, I am going to treat
9 your motion as being submitted. If you want counsel to
10 come back to me, I will consider it.

11 MR. INTERSIMONE: Your Honor, also I paid Mr.
12 Bergman in full. I have a letter here to that effect. I
13 don't know if you would like to see it.

14 THE COURT: No.

15 MR. INTERSIMONE: I don't know if that's neces-
16 sary. He is paid in full. For the appeal, for this thing
17 and for everything.

18 I don't want you to think this is a ploy. I
19 don't want Mr. Beller to think that I discharged him as a
20 ploy to get time because time is against me, so if I look
21 for time I am only cutting my own throat. So I am not look-
22 ing for time. Personally I like Mr. Bergman. I just felt
23 I better take care of things on my own for the time being
24 until I can get somebody to handle it for me.

25 Can I get a ruling from the court while Mr.

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2 Esposito is here so I can get all the minutes and anything
3 pertaining to my case --

4 THE COURT: Whatever they have, I am sure they
5 will be glad to turn over to you.

6 MR. INTERSIMONE: Mr. Keegan got paid too, your
7 Honor.

8 THE COURT: All right, Mr. Beller..

9 MR. BELLER: Your Honor, I will be very brief.
10 As I tried to break down the motions as I understood them,
11 there seem to be two wings. One is a claim that the jury
12 was infected. Well, the claim has already been taken care
13 of by the court's voir dire of the jury as I pointed out in
14 the last occasion when this was raised and so really what
15 we would be looking at is anything that came to the court's
16 attention since that time. Mr. Bergman made the same appli-
17 cation on January 31st and we discussed it at that time.
18 There was nothing that has come to the court's attention.

19 As I pointed out at that time, the request to
20 interview the jury, although Mr. Fisher graciously says that
21 he will do it himself, that would be improper. It's in
22 violation of decisions by the United States Court of Appeals
23 in this circuit and I am talking specifically of United
24 States versus Brasco, United States versus Miller which
25 requires, as I read those cases, that any such post-trial

2 interview of the jury be done by the court and not by
3 counsel.

4 Therefore, it's a request for a hearing by the
5 court, a hearing that the court has already conducted, so
6 it seems that the proper way to view it is what has come
7 to the court's attention since the court held the first
8 hearing on this matter. And the government submits that
9 there is absolutely nothing. There is the Maline affi-
10 davit, there is nothing in that. There is an affidavit of
11 Mr. Fisher which generally speaks about here are some facts
12 that came to my attention and I'm going to submit some
13 affidavits which support what I say. Those affidavits have
14 not been forthcoming.

15 The only thing on this particular issue that
16 remotely touches the question is a hearsay affidavit of
17 Mr. Keegan and our position on that affidavit is clear and
18 I think the court has already commented on it and in con-
19 nection with that issue I would like to submit some grand
20 jury minutes in camera, ex parte I guess is the proper term
21 as they are sealed, but they do reflect on the validity of
22 the showing of what's contained in that affidavit, in the
23 Keegan affidavit, and whether the court should consider
24 that as sufficient on the matter of holding a hearing, and
25 with the court's permission I would like to do that.

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2 The only other thing that even more remotely
3 touches on it is, I suppose, though this argument really
4 hasn't been made, in papers at least, the claim that Juror
5 2, 8 and 10 were friendly, whatever that means, and also
6 2 and 8 had some view in the deliberations about the defen
7 dants.

8 Frankly, I don't understand the claim but what
9 I do understand is that when Ms. Blau on the tape recording
10 the admissibility of which we don't concede for a moment,
11 but since it's been discussed just touch on it, when she
12 first discussed that matter, she said that the friendship
13 between these jurors seemed to pale not after No. 10 was
14 dismissed but after the incident which she reported to the
15 court about Juror No. 2's anti-Semitic remarks, allegedly
16 anti-Semitic remarks, made during a luncheon conversation
17 which lunch was held in the plaza.

18 If your Honor remembers, it was in the summer
19 months and the jurors were eating in the open air plaza
20 and that's what she refers to at the first time when she
21 says it on the tape, she says it was after that incident
22 when she complained to the court and I think your Honor
23 then interviewed Juror No. 2 with respect to that matter

24 Later on when Mr. Bergman puts the question in
25 a different fashion, she says it had something to do with

2 the dismissal of No. 10 but my memory of the tape is that
3 at the first she puts it in connection with this incident
4 that she brought to the court's attention. And the lunches
5 that they were having were not lunches where they were walk-
6 ing off on Broadway and Chambers Street. These were sitting
7 in full view with other jurors as I remember in the plaza.

8 The second matter is this matter of newspaper
9 publicity and I think if ever there was really a phony
10 issue, this is it. It's true that Mr. Bergman stated that
11 he didn't see anything to this issue and I think that was
12 a proper reasoned judgment based on the information. It's
13 only Mr. Fisher who came to the court with the information
14 saying the jurors were apprised of information about the
15 defendants in the plural, talking about their bad character
16 which was referred to in the jury room during the delibera-
17 tions. The validity of Mr. Fisher's hearsay statements
18 and how much they relate to the truth or the actual fact
19 which we have already discussed it's really sort of pointed
20 out by this incident. Not in any way suggesting Mr. Fisher
21 was doing anything improper, it's just that the information
22 he had does not remotely bear on what's in the tape.

23 Ms. Blau is asked was any information -- this
24 is a rough transcript that I made of this issue. Did any
25 of the jurors ever indicate that they knew anything about

the background of any of the defendants. Well, the two Puerto Rican men in regard to not Nelson, the other one, Juan Alvarez. They had read the Spanish newspapers, they knew all about him and she is definitely talking about Tony Alvarez and only Tony Alvarez.

Subsequently, did they indicate that any of the other Spanish speaking defendants, that they had read anything about them? No. That's what she says. It was mainly Juan Alvarez and they knew all about him, yes. That's what it says. It's absolutely clear that she is talking about Tony Alvarez and nobody else, even when she was aksed specifically, well, anybody else, tell us about someone else. She says no, it was Tony Alvarez. Any doubt on that score? Not for the moment to suggest that the jurors did violate the court's ruling and actually did read the newspaper, but the only article that they could have read which we were able to find, and I want to put on the record that it's the government's submission and not the defendant's submission with respect to these newspaper articles, is an article which is the Government's Exhibit C appended to the papers which deals exclusively with Juan Antonio Alvarez. This is the article of August 15, 1976 which in remarkably responsible and accurate fashion relates the government's opening statement at the

2 trial and it does deal only with Tony Alvarez and no one
3 else.

4 I do want to point out, your Honor, that even
5 this matter of the jury publicity is not before the court
6 in any competent fashion. The defendants, both of them and
7 their counsel had a full opportunity to go to Ms. Blau and
8 get an affidavit on this score and didn't do it and this
9 is regardless of when Mr. Bergman and Mr. Maline got page
10 2 of the statement. They themselves knew that these writ-
11 ten statements and the tape recording were insufficient,
12 as from an evidentiary matter, to bring before the court.
13 At least that's the only explanation of Mr. Bergman's
14 otherwise rather preposterous explanation why he didn't
15 tell the court on January 31st that he had participated
16 in an hour and a half discussion with Ms. Blau.

17 I think he said himself that he realized that
18 that was not evidence to bring before the court in a tape
19 recording and that he needed affidavits, so he knew that
20 this matter of the publicity, as did Mr. Fisher, required
21 an affidavit and they just never got it. It at least
22 suggests the possibility that Ms. Blau is unwilling to put
23 that in affidavit form, just as it suggests that Mrs.
24 Intersimone is not willing to swear to what counsel say
25 she might say.

1 I just want to -- it seems even on this public
2 issue there are two things. One, granting for the moment
3 that the two jurors may have read something in the news-
4 paper, what did they tell the other jurors? There is
5 nothing before your Honor to suggest that they said any-
6 thing at all improper. The ten other jurors had before
7 them, we know all about it. That by itself is not a
8 statement of any prejudice whatsoever.

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10 It also seems rather unlikely, in view of Ms.
11 Blau's willingness to bring before the court by letter
12 form outrageous and exaggerated statements of the problems
13 with our judicial system, that if the jury had in any way
14 considered, I am talking about the ten others -- had in any
15 way considered anything somebody said they read in a news-
16 paper, that she would have left that out.

17 It seems rather -- if it happened at all. The
18 fact she didn't mention it in her letter suggests that it
19 rather -- it's rather remarkable actually she didn't men-
20 tion it in her letters, but it certainly would be note-
21 worthy if they took it into account she wouldn't have
22 brought it to your Honor's attention. It seems more likely
23 in the hypothetical situation what actually happened is
24 they said that's ridiculous, it's not evidence.

25 The other thing is the two jurors themselves and

1 I think Mr. Fisher pointed this out, what did they know
2 if they read the newspapers. And that's why the government
3 submitted these newspaper articles to show that even if
4 what Ms. Blau says is true, there is nothing they could
5 possibly have read that would in any way have tainted
6 them. The only article that really could conceivably have
7 been before them, since they said they hadn't read any
8 publicity before being voir dired, the only article that
9 could have been before them is this August 15th article
10 from El Diario which contains nothing coming even close
11 to a question of prejudice and really in fact just tells
12 the facts that the government said in its opening state-
13 ment.
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15 That is the purpose of that submission, your
16 Honor, not to suggest that they read it or that these were
17 in the jury room or anything like that. Just that if it's
18 true, this is all they could have read and there is nothing
19 to this at all that would require a hearing.

20 I think there is a real distinction between
21 jurors coming into the jury room and saying I read some-
22 thing in the newspaper, which is a situation that is not
23 covered by any of the cases that I have seen, and a situa-
24 tion where newspaper articles are found in the jury room.
25 When the articles are in the jury room, other jurors can't

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say, well, you say you know all about the, you are making

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that all up. They have the articles, they see there, oh,

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this man is a, well, whatever outrageous statement would

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constitute prejudice. They can't say you didn't read that

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in the newspaper because the clippings are right there or

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where a bailiff tells the jury, as is covered in United

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States versus Maddox, where the bailiff tells the jury,

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this guy has been convicted before, that's an objective

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fact coming from a court official.

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We don't know in how many countless cases when

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it really gets down to the line and the jurors are becom-

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ing advocates themselves and they have a position to take,

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they don't say, I know something about him that tells me

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that he is guilty and I read it in a newspaper, even if

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they didn't and they are just puffing or trying to per-

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suade somebody of their position.

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On the showing that's been made in this case, r

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articles in the jury, assuming it's all true, if all that

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was said is we know all about him, we would have post-

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trial examinations of jurors in every single case because

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it's entirely possible that it happens in every single

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case. It's exactly the sort of situation that the cases

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say judges, lawyers, government, you can't do this because

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there is here a potential for abuse so great as to

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completely undermine the whole system of justice. The possibility of putting doubt in jurors' minds, suborning jurors and casting discredit on the whole integrity of the judicial system.

I do have a couple of requests, your Honor. The first is that the court's order to the extent there is any doubt about it, that the court's order about interviewing and -- the court's order with respect to what people can do with jurors be clarified and I would ask your Honor that the order, first of all as I have always understood it, that it extend to all of the jurors and that it mean exactly what Mr. Bergman said he understood it to mean when your Honor issued the order, that is, no talking to jurors.

THE COURT: That was my intention.

MR. BELLER: Okay.

THE COURT: I will make that explicit if it wasn't heretofore explicit.

MR. BELLER: Shall we submit an order or would your Honor issue an order to that effect on all counsel? In fact, I would ask that all the defendants be guided by it because I am particularly distressed by this matter that came up in the tape of Mrs. Dunmore telling Ms. Blau that Mr. Beller was investigating Ms. Blau.

I think this is exactly the kind of situation

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2 that should be avoided because it's totally untrue. In
3 the event these minutes are given to Ms. Blau, she should
4 know it's totally untrue and an unfair claim.

5 I also want to point out that Mr. Bergman said,
6 when he spoke to Ms. Blau, again in violation of the court's
7 order on the telephone, shortly before the last hearing we
8 had, he said Ms. Blau told him she knew that there had been
9 a recording of the conversation. It escaped my mind to ask
10 him how it is she knew that, but again it seems somebody
11 is communicating information to Ms. Blau, from what source
12 we don't know.

13 The other thing is Mr. Fisher has, it's not
14 clear what these motions are and we would ask that the
15 motions be finally designated as what they are. This is
16 a motion for a new trial. Mr. Fisher's motion is in some
17 sense pending, whether he has made it or not I don't know,
18 but that this be considered as his motion for a new trial
19 because, as I understand it, there has been an extension
20 granted for him to make that motion.

21 I think at some point these proceedings, these
22 particular proceedings have to come to an end, that is,
23 the motions for a new trial as to this defendant, Mr. Moten,
24 finally be granted or denied and to do that it has to be
25 made and I would ask that the court take it as already

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2 having been made.

3 I would also like permission to use your Honor's
4 copy of the original tape recording to make a transcript
5 of that recording.

6 THE COURT: Any objection?

7 MR. FISHER: I object with regard to the tran-
8 script if they are going to, if the government is going to
9 offer it for this court's consideration or for the purpose
10 of the record.

11 THE COURT: We will get to that when we get to
12 it. Any objection to putting it in the government's
13 possession to listen to it?

14 MR. FISHER: No, your Honor.

15 THE COURT: Very well. I will reserve decision.

16 MR. BELLER: On the matter of the order on talk-
17 ing to the jurors, does your Honor reserve on that?

18 THE COURT: Let's put it this way. Hang in
19 there a little bit. You are right about it and that was my
20 intention and we will deal with it accordingly.

21 MR. INTERSIMONE: Your Honor, may I say that I
22 may have some other issues to present to the court that
23 might be very germane to your decision. It may be a new
24 thing that maybe my lawyer hasn't presented to you before.

25 THE COURT: I will only deal with what was
presented to me before.